**Florida State University Journal of Land Use and Environmental Law**

Volume 3
Number 2 *Fall 1987*

Article 1

April 2018

# Avoiding the Takings clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work

James L. Huffman
*Lewis and Clark Law School*

# Avoiding the Takings clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work

**Cover Page Footnote**
I am grateful to Annette Talbott for research assistance and to Ed Brunet for his advice and criticism.

JOURNAL OF LAND USE AND ENVIRONMENTAL LAW

VOLUME 3 FALL 1987 NUMBER 2

# AVOIDING THE TAKINGS CLAUSE THROUGH THE MYTH OF PUBLIC RIGHTS: THE PUBLIC TRUST AND RESERVED RIGHTS DOCTRINES AT WORK

JAMES L. HUFFMAN*

## I. INTRODUCTION

For much of American history, the dominant approach to natural resources allocation has been a system of private property.[1] Because the rights of property owners are given explicit protection under the federal Constitution,[2] proponents of increased governmental involvement in natural resource management have always been faced with the prospect of constitutional challenges. The constitutional protection of private property, particularly the takings clause of the fifth amendment, has generally been viewed as an unfortunate obstacle in the path of public action.[3] Although the tak-

* Professor of Law and Director of the National Resources Law Institute, Lewis and Clark Law School. B.S. 1967, Montana State University; M.A. 1969, Fletcher School of Law and Diplomacy; J.D. 1972, University of Chicago.

I am grateful to Annette Talbott for research assistance and to Ed Brunet for his advice and criticism.

1. For much of the 19th century, the federal government sought to dispose of its vast land holdings in the West. Not until the 1890s did the government reserve significant areas from private acquisition, and even then the general policy of putting land into private hands continued into the early decades of the 20th century. *See* P. GATES & R. SWENSON, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).

2. The fifth amendment guarantees that no person shall be "deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." The fourteenth amendment contains a similar due process provision which has been interpreted to apply the takings clause to the states. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).

3. Unlike the first amendment's protection of free speech, which has often been analyzed as providing public benefits, the takings clause has consistently been viewed as serving only the interests of private parties. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970). It is seldom suggested that the public interest might be served by protecting private property rights; that is, that society will benefit from a secure and certain system of property rights. The takings clause is thus championed by the self-serving to the detriment of the public, while the first amendment is championed by those who seek to serve the public's interest in democratic government and truth. Ever since the Supreme Court validated zoning laws in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the question has been how far the state could go in regulating private property without compensation, rather

ings clause has been of little real significance for at least five decades,[4] the possibility that the Supreme Court would some day breathe new life into a dormant clause seemed to haunt the public planners and offer hope to the free marketeers. In the wake of Richard Epstein's book, *Takings: Private Property and the Power of Eminent Domain*,[5] although certainly not because of that coherent argument for a meaningful takings clause,[6] the Supreme Court has tossed a few small bones to those who hope the public planners will face a real, rather than an imagined, obstacle.[7]

Only time will tell whether the Supreme Court has launched a new era in takings law.[8] If it has, governments will be required to

---

than how and under what circumstances the public interest could be served by requiring compensation for limits on property rights.

4. Although the Supreme Court has occasionally held that governmental actions have resulted in unconstitutional takings, most forms of government action have been upheld as legitimate exercises of the police power requiring no compensation. The Court has applied a balancing test which normally results in upholding the government action. The only consistent exceptions have been where property is regulated to the extent that it has no remaining economic uses and where there has been a physical intrusion or occupation of the property. For a survey of the historical foundations of takings doctrine, see F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973). Literature on the takings issue is abundant. Important examples include: B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

5. R. EPSTEIN, *supra* note 4.

6. Perhaps Epstein and other commentators had some influence on the Court's decisions during the 1986 term, but the Court will have to take enormous strides before it reaches the radical position proposed by Epstein. Epstein calls for distinct analysis of four different questions: (1) Is there a taking? (2) If there is a taking, is it for a public use? (3) If there is a taking for a public use, is it justified as an exercise of the police power? (4) If there is a taking for a public use which is not justified, has just compensation been paid? R. EPSTEIN, *supra* note 4, at 198. The Court has not begun to sort out these issues in its muddled takings jurisprudence.

7. After deciding contrary to Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), in Keystone Bituminous Coal Association v. DeBenedictis, 107 S. Ct. 1232 (1987), the Supreme Court rendered two opinions which suggest a potential shift in takings doctrine. In First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (1987), the Court held that where a taking exists, compensation will be required even if the taking is temporary. Although land use regulators have evidenced concern about the possible impact of the decision, a concern fueled by Justice Stevens' dissent, the decision does nothing to alter the definition of what constitutes a taking. In Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987), the Court held that the conditioning of a rebuilding permit on the granting of a public beach access easement across private property constituted a taking under the fifth amendment.

8. Two of the three 1987 decisions were by 5-4 votes; the third, *First English*, was 6-3. Justice Powell was with the majority in *First English* and *Nollan* and dissented in *Keystone Bituminous Coal Association*, so his retirement is not likely to have any effect, assuming

bear some of the costs of planning and regulation which are now borne by private property owners,[9] unless some means can be devised to avoid the conclusion that private property rights have been taken by particular government actions. In the area of water and water-related resources, the means of constitutional circumvention already exist in the form of the doctrines of public trust and reserved rights. The trick is a simple one. Rather than admitting that public action has affected a private property right and then seeking to justify that effect as a legitimate exercise of the police power, these doctrines lead to the conclusion that a private property right never existed in the first place and thus nothing has been taken as a result of the government action.

Perhaps the most puzzling thing about the takings doctrine, aside from its general incoherence,[10] is that it never adopted this simple trick across the board. The standard explanation of takings law was that if government was acting pursuant to the eminent domain power, it had to compensate, but if it was acting pursuant to the police power it did not have to compensate.[11] Of course, this explained little since it then was necessary to determine whether government was acting pursuant to the police or eminent domain powers. As with most areas of modern constitutional law, the Court ultimately posed a balancing test under which compensation was required only if the loss to the private property owner outweighed the benefits to the public. The case law demonstrates that this was seldom the case.[12]

The central weakness in the Supreme Court's takings doctrine is that it permits uncompensated takings of private property whenever the balance favors the public's interest in the government's

---

that President Reagan is successful in placing a new member on the Court.

9. The pervasive notion that society can avoid the costs of public action if government can avoid compensating for property affected is simple self-deception. The costs of government action will be borne by someone. The compensation requirement, like a rule of liability, simply determines who that someone will be.

10. *See* Huffman, *A Coherent Takings Theory at Last: Comments on Richard Epstein's "Takings: Private Property and the Power of Eminent Domain,"* 17 ENVTL. L. 153 (1986).

11. "[S]ome values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits . . . . When [the limit is reached] there must be an exercise of eminent domain . . . ." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

12. "Although the justices may 'balance' public and private interests in these cases, it is assumed that the public interest will prevail unless the regulation enriches the government or public by regulation[s] which terminate or eliminate the primary economic value of a property interest." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 486 (2d ed. 1983).

action. As the private property owners have been at constant pains to point out, the fifth amendment says "nor shall private property be taken for public use, without just compensation."[13] It does not say that private property sometimes may be taken without compensation. The Court's problem has been to explain this divergence from the constitutional language, or to formulate a definition of takings which conforms to the results of the cases.[14] The Court's efforts only revealed the flaws in their approaches.[15] Meanwhile a model for logically reading the takings clause out of the Constitution was within easy reach in the doctrines of public trust and reserved rights.

The beauty of the public trust and reserved rights doctrines is that they do not pit private rights against governmental regulatory power.[16] Rather, they pit private rights against public rights, and to the senior right goes the spoils. Under the public trust doctrine, the public rights are always senior. Under the reserved rights doctrine, private rights will sometimes be superior. But in both cases, there is no issue of a taking since the exercise of a superior right is by definition not a taking. The private right claimants may have believed they had superior rights, but it turns out they did not and, therefore, they had nothing to be taken by the government action.

The same result could be achieved in a general way by simply asserting that all private property rights are held subject to an easement in the form of the state's police power. This is different from saying that private property rights exist but can be regulated by the state. Rather, the assertion would be that the parameters of a property right are determined as much by the police power as by

---

13. U.S. CONST. amend. V.

14. In his book on eminent domain, Epstein relies heavily on language interpretation to support his position. He says that "some asserted definitions are just wrong; stable and unique meanings are possible and usually obtainable in fact." R. EPSTEIN, *supra* note 4, at 24.

15. Illustrative of the outcome of Supreme Court takings jurisprudence are Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), and Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). In the former case, the Court upheld a New York City historic preservation ordinance which prevented Penn Central from constructing a high rise office building above Grand Central Station, a probable loss in property value of millions of dollars. In the latter case, the Court invalidated an ordinance requiring a landlord to permit the installation of television cable facilities on her premises, an intrusion of insignificant worth in economic terms. The difference was that the latter case involved a physical invasion, while the former case involved a mere regulation.

16. For a general discussion of the public trust doctrine, see *infra* Part III, section A. For a general discussion of the reserved rights doctrine, see *infra* Part III, section B.

easements held by other parties—that the state holds some of the sticks from the proverbial bundle which constitutes property rights. When the state exercises its police power "property rights," it may affect private property rights, but it does not take them since it is exercising rights which the private party never possessed. If the Court adopted this approach, it would no longer face the need to explain why some limitations on private property rights require compensation while others do not, or to devise contorted definitions of taking which expose the hypocrisy of purporting to adhere to the fifth amendment requirement.

Simply stated, this approach to the takings clause would avoid the need to admit that private rights are being required to give way to uncompensated limitations by asserting that the alleged private rights never existed in the first place. Clearly, this is only playing with words—describing as the exercise of public rights that which existing doctrine describes as regulating private rights—but that is the essence of many justifications of legal outcomes. The judicial task is to justify legal decisions with reference to existing law including the Constitution. Applied to general governmental actions which affect private property, the approach of the public trust and reserved rights models would do wonders to clean up the mess that is the takings doctrine.

Would anyone be fooled by the legal shell game I propose? Surely most already will have concluded that I am influenced more by Lewis Carroll than by Oliver Wendell Holmes.[17] So I must hasten to say that I am only kidding. Complicated constitutional problems cannot be avoided by simplistic fictions which do not represent the real world. But that is precisely what the courts have accomplished via the public trust and reserved rights doctrines. In water law, the courts may be tempted to extend the pretense to the doctrines of custom and reasonable use and, from there, it would be a short step to the equation of the police power with the concept of preexisting public rights. Indeed, the Florida Supreme Court has come precariously close to achieving this near total

17. Holmes was a realist but could not have engaged in the enterprise of judging without believing that language has some determinable meaning. Some might conclude that the Supreme Court's recent *Keystone* decision is closer to the reasoning of Humpty Dumpty in *Alice in Wonderland* than it is to the reasoning of Holmes in *Pennsylvania Coal Co.* See *supra* notes 7 & 8 (briefly discussing these two cases). In answering Alice's confusion over his use of the word "glory," Humpty Dumpty says: "When I use a word . . . it means just what I choose it to mean—nothing more nor less." L. CARROLL, THROUGH THE LOOKING GLASS, ch. 6 (1865).

emasculation of constitutionally protected property rights.[18] The central point I wish to make in this article is that the absurd argument which I have posed in this introduction is precisely the argument which supports modern public trust and reserved rights doctrines.

Because the public trust and reserved rights doctrines are firmly anchored in the law relating to water resources, Part II will briefly examine the law which governs the allocation of water and water-related resources. The reader with a basic understanding of water law may prefer to skip this part of the article. Part III describes the limits of the two doctrines and their modern applications and uses the limits of the doctrine of custom to illustrate why the public trust and reserved rights doctrines are so readily employed to evade the takings clause. Part IV examines the impact of the modern public trust doctrine on private property rights. Part V is a critique of the role of the courts in these developments and an argument for distinguishing appropriate from inappropriate judicial activism in a constitutional democracy. Part VI is a conclusion which urges that the public interest will be better served by adherence to the clear purposes of the fifth amendment takings clause than by avoidance of the amendment's requirements through the mythology of the modern public trust doctrine.

## II. Rights in Water and Related Resources

The allocation of water and water-related resources presents unusual problems which have resulted in the creation of special systems of law for each of the various resources. Water is generally a transient resource for which traditional rules of property have never been considered workable as a means for allocation. Because water is often a scarce resource, its allocation as common property has invariably led to the tragedy of pollution and depletion forecast by Garrett Hardin.[19] The legal solution to these problems has varied with the kinds of uses to which water is allocated. Allocation to uses which deplete or alter the natural flow of a watercourse has been achieved through either riparian or appropriation law, both of which recognize usufructuary rather than possessory

18. *See infra* notes 195-97 and accompanying text.

19. Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968). Hardin's basic thesis is that those who share rights in a common property will have much greater incentives to exploit the property than to conserve and maintain it, which will ultimately result in the destruction of the resource.

rights in water.[20] Allocation to uses of the natural flow of a watercourse has been accomplished by various forms of common property law, with varying results, depending upon the particular use and the particular water supply.[21]

Submerged land and the resources contained in submerged lands have been allocated according to special rules which reflect both the nature of the uses of the overlying waters and something of the history of our federal system of government.[22] Special rules also have developed for the allocation of riparian lands because of the influence which control over those lands has upon the access to water, and because of the short and long term shifts in the boundary between water and land on most watercourses.[23] Groundwater is also allocated according to distinct rules of law which evolved on the assumption that ground and surface waters are separate resources. Advances in the science of hydrology have long since corrected that misunderstanding, but the law is far from having adjusted to this reality.[24]

### *A. Private Rights in the Use of Water*

As a general rule, American water law is different east and west of the 100th Meridian.[25] Those states lying to the east adhere to some version of the riparian rights system which had its origin in the English common law.[26] Those states lying to the west adhere to the appropriation doctrine which developed during the early settlement of the western mining camps.[27] The several states along the 100th Meridian and the three west coast states have a combination of the two systems.[28]

---

20. *See infra* Part II, section A.
21. *See infra* Part II, section B.
22. *See infra* Part II, section C.
23. *See infra* Part II, section D.
24. *See infra* Part II, section A.
25. On water law, *see generally* 1-5 WATERS AND WATER RIGHTS (R. Clark ed. 1967-72). The discussion in the text focuses on the dominant water law doctrines among the states. Two states, Hawaii and Louisiana, have water laws which do not conform to the dominant systems. Hawaiian water law derives from the ancient Hawaiian system of tenure in land. The water law of Louisiana is based on the civil code and the state's early French and Spanish influences.
26. *Id.*
27. On western water law, *see* 1-3 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES (1971).
28. The 100th Meridian states (North Dakota, South Dakota, Nebraska, Kansas, Oklahoma and Texas) apply riparian law to their more humid eastern regions and appropriation law to their arid western regions. Although California, Oregon and Washington ad-

Under riparian law, a landowner has a correlative right to make reasonable use of the water to which riparian land gives access.[29] Under appropriation law, rights to use water are acquired by putting the water to beneficial use and senior rights have preference over junior rights.[30] Most states have a permit system and other regulations which, at a minimum, give the state a means of maintaining official records of private rights in water use.[31] Many of these regulatory systems also give the state the authority to control future water uses and some ability to regulate existing uses of water.[32]

The rights which exist under both riparian and appropriation law are private rights in the same sense as private rights in land or other forms of property. The fact that the rights are usufructuary rather than possessory is of less significance than the distinction might suggest, or than advocates of uncompensated regulation often urge.[33] The designation of a right as usufructuary does not mean the right is entitled to lesser constitutional protection; rather, it is a distinction reflecting the nature of the resource and its uses. A water user generally has no interest in possessing the water except to the extent that the use results in consumption, and to that extent the user effectively has a right of possession.[34] The water rights owner may exclude others from interfering with his use. Water rights are generally transferable and where they are not, it is because either the right is correlative or the law simply

---

hered to riparian law in their early history, only California continues to maintain a general combination of both doctrines.

29. *See* Ausness, *Water Use Permits in a Riparian State: Problems and Proposals*, 66 KY. L.J. 191, 199 (1977).

30. 5 WATERS AND WATER RIGHTS, *supra* note 25, §§ 408.1, 410.1-.2.

31. Among western states, Wyoming was first to adopt legislation which provides a uniform system of water rights administration. Act of Dec. 22, 1890, ch. 8, 1890-91 Wyo. Sess. Laws. Other states allowed many decades to pass before adopting such legislation. For example, Montana did not have a uniform permit procedure until 1973. *See* MONT. CODE ANN. §§ 85-2-301 to 85-2-401 (1979).

32. Perhaps the most sophisticated law is the Alaska Water Code. *See* ALASKA STAT. §§ 46-15-100 (1987). In the context of a discussion of the takings clause it is important to note that state regulation of private rights in water is much less extensive than state regulation of private rights in land.

33. *See, e.g.*, SMITH, THE PUBLIC TRUST DOCTRINE: INSTREAM FLOWS AND RESOURCES 15-16 (1980).

34. Consumptive use is possessory in the sense that the water is not available for the use of others, but this is only true in the short term. The particular water molecules consumed will eventually return through the hydrologic cycle, perhaps to be used by others, but more probably to become part of one of the earth's oceans which contain 97% of the earth's water supply.

prohibits transfer,[35] not because the right is usufructuary.

The significance of the usufructuary label is only to indicate that several parties will generally have the right to use the same molecules of water successively. This does not mean that water cannot be reused by the same user indefinitely if the nature of the use permits,[36] but only that a user will be required to release the water, once used to the extent of that user's right, to avoid infringing upon the existing rights of others. The usufructuary nature of the right in no way means that it merits less protection against private or public infringement than possessory rights.

Groundwater is subject to different but analogous legal regimes.[37] The English common law rule was that the owner of overlying land had an absolute right to whatever water could be extracted from underlying aquifers.[38] Similar to their modifications of the English riparian doctrine, American jurisdictions adapted the absolute ownership rule with a reasonable use requirement and in many states with a correlative rights limitation.[39] Other states applied the appropriation system to groundwater, recognizing a superior right in the earlier user of the water.[40] Like rights in surface waters,[41] rights in groundwater are vested private rights entitled to protection against public and private infringement. Some states, however, have adopted the position that groundwater is public

35. Water rights transfer has been the subject of considerable study in recent years. It has been widely argued that restraints on transfer are a hindrance to the proper functioning of a market in water rights and thus to the efficient allocation of water. *See* L. HARTMAN & D. SEASTONE, WATER TRANSFERS: ECONOMIC EFFICIENCY AND ALTERNATIVE INSTITUTIONS (1970); Burness & Quirk, *Water Law, Water Transfers, and Economic Efficiency: The Colorado River*, 23 J. LAW & ECON. 111 (1980); Trelease, *Changes and Transfers of Water Rights*, 13 ROCKY MTN. MIN. L. INST. 507 (1967). The central legal problem with transfers is to prevent infringement upon other rights which might be affected by changes in the point of diversion, the place of use, or the nature of the use.

36. There are probably no water uses which are 100% efficient in the sense that no water is consumed or lost to evapotranspiration. However, for some water uses, such as cooling systems, swimming pools, and pumped storage for hydroelectric generation, reuse of the same water by the same user is both physically and economically possible.

37. *See* 5 WATERS AND WATER RIGHTS, *supra* note 25, §§ 440-441.

38. 1 WATERS AND WATER RIGHTS, *supra* note 25, § 52.2(B).

39. *Id.*

40. *Id.* at § 4.1.

41. The term "surface waters" is used here to describe waters in rivers, streams, lakes and ponds. The term is also used to describe surface runoff which has not yet been absorbed by the ground, evaporated into the air, or become part of a watercourse. The distinction is important because the latter type of surface water is subject to different rules of ownership. In most jurisdictions, these waters are owned by the owner of the land on which they occur until they join a watercourse or cross onto another land ownership. *See* 5 WATERS AND WATER RIGHTS, *supra* note 25, § 456.1.

property subject to public allocation and management.[42] In states where the law has not previously recognized private rights in groundwater, the assertion that groundwater is public property does not suggest any constitutional problems. However, where private rights have been recognized and exercised, this development in groundwater law is closely related to the public rights developments in surface water law which are the central concern of this article.

### *B. Public Rights in the Use of Water*

Throughout American history, private rights in the use of water have existed subject to certain public rights. Under the English common law, these public rights were always associated with navigation and fishing.[43] The basic idea was that certain waters provide means for travel and sources of food which the general public has long relied upon. Private rights in the use of water were found to be perfectly compatible with these public uses so long as the private user did not obstruct or interfere with the public uses. Thus, the private rights were held subject to a sort of easement for public navigation and fishing.[44]

---

42. For example, the Colorado Supreme Court held in 1983 that nontributary groundwater (which is not hydrologically connected to surface waters) is neither subject to the state constitutional right of appropriation by citizens nor owned by the overlying landowner. Thus, the state legislature is free to do with these groundwaters as it chooses. State v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294 (Colo. 1983), *cert. denied*, 466 U.S. 944 (1984). There is no suggestion in the opinion that the legislature would be precluded from creating a system of private rights in such water. However, if the modern public trust analysis were extended to groundwaters, it would lead some to the conclusion that the legislature has no authority to alienate either usufructuary or possessory title to groundwater. If this step were taken, it would be a short jump to the conclusion that existing private rights in groundwater are invalid because improperly alienated by the state.

43. This statement will be disputed by advocates of the modern public trust doctrine, but the English and American case law is very clear on this point. Even in Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892), "the lodestar in American public trust law," Sax, *supra* note 4, at 489, the court expressly limited the doctrine to a trust "for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." 146 U.S. at 452. A case can be made for bathing as a public right under the historic doctrine, *see* Lamprey v. Metcalf, 52 Minn. 181, 53 N.W. 1139 (Minn. 1893), although it is doubtful that bathing was intended to include the right to engage in carcinogenesis by frying one's skin by the shores of navigable waters as some modern courts have suggested. *See* Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 325, 471 A.2d 355, 365 (N.J. 1984), *cert. denied*, 469 U.S. 821 (1984).

44. Some object to describing the public trust as an easement (*see* dissent of Justice Sheehy in Galt v. State, 731 P.2d 912 (Mont. 1987)), but without this characteristic, the doctrine simply merges with the state's police power and loses any significance as an inde-

Early American law recognized these public rights and adapted their parameters to the distinct characteristics of the North American continent. Where the English law had equated navigable with tidal waters, American jurisdictions included the many navigable rivers and lakes of North America within those waters where private rights would be subject to public rights.[45] This was simply a recognition of the importance of those inland waterways to the commerce and sustenance of the new nation.[46] With the formation of the Union under the Constitution of 1787, the protection and promotion of the public right in navigation was delegated to the national government while the states retained the responsibility for other public rights in water.[47]

This constitutional division of responsibility was well conceived for a society where the basic approach to water allocation was a system of private rights. Under the Constitution, the states continued to have jurisdiction over most aspects of private law and were thus in the best position to determine the extent to which public rights existed in conjunction with private rights. The national government's interest in water was limited to its responsibilities with respect to interstate and foreign commerce.[48]

The impact on the states of the national government's commerce clause based jurisdiction over water use is thus dependent upon the reach of the national power to regulate commerce. There was a time when the definition of navigable waters was critical to the determination of the extent of state and national powers, but history tells us that the reach of the commerce power is equal to Congress' grasp,[49] which means that the regulatory power of the states exists

---

pendent concept. It also loses much of its force as a limitation on the actions of public resource managers.

45. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851). This case actually concerned the question of admiralty jurisdiction but involved a recognition that many inland waters were similar to tidal waters in terms of public use.

46. [T]he men who first formed the English Settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers if the land under the water at their very doors was liable to immediate appropriation by another as private property . . . .

Martin v. Waddell, 41 U.S. (16 Pet.) 367, 414 (1842).

47. The United States Constitution says very little about state powers, so this conclusion simply reflects the idea that the national government is one of enumerated powers and the residue of the police power remains with the states.

48. U.S. CONST. art. 1, § 8, gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States . . . ."

49. The commerce power has been interpreted to justify any regulation that is rationally related to a legitimate federal purpose. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITU-

at the discretion of the national government.[50] Notwithstanding this potentially unlimited national power over the regulation of the nation's waters, the states have retained complete authority with respect to the allocation of private rights in water use.[51] Thus, it is important to the private rights holder to know the impact of national power on the extent of private rights. The concept which defines that impact is the navigation servitude.

The navigation servitude, as the term servitude suggests, is a right in the nature of an easement which is superior to any private rights in the use of water.[52] It is a public right which the national government is responsible for protecting and promoting, and which predates and is superior to the private rights recognized or created by the states. Like a private easement, it defines the extent of the associated private rights. It permits national governmental actions falling within the servitude without requiring compensation to affected private rights holders. Although it is often stated that the navigation servitude permits the federal government to alter private rights without compensation,[53] the sound theoretical explanation is that compensation is not required because no private right exists to be taken. The private right holder has never had the power to interfere with the public's navigational rights. Because the navigation servitude is best explained in these terms, it presents yet another opportunity, through expansive construction, for public allocators of the water resource to evade the constraints of the fifth amendment. Unlike the modern public trust doctrine, the navigation servitude has not yet been interpreted in this manner.[54] Thus the vast expansion in federal commerce power has had more serious consequences for the power of state governments

---

TIONAL LAW 138-81 (1983).

50. This is true in two senses. The states may have the power to regulate where Congress has the power but has chosen not to exercise it. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). Or, Congress may authorize the states to regulate where they would otherwise not have the authority to do so. Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946).

51. Congress could probably control the allocation of water resources to private users but has expressly recognized state authority. *See infra* notes 140-44.

52. *See e.g.*, Gibson v. United States, 166 U.S. 269 (1897); Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954).

53. "[T]he 'navigation servitude,' or rule of no compensation . . . allows the federal government in special circumstances to regulate waterways and to adversely affect private rights without compensation." D. GETCHES, WATER LAW 338 (1984).

54. In Kaiser Aetna v. United States, 444 U.S. 164 (1979), the Supreme Court rejected a claim that waters made navigable by the efforts of a private landowner were subject to the navigation servitude.

than it has had for private rights in water.[55]

Under the constitutional division of powers between the national and state governments, the states retain authority and responsibility to protect and promote public rights in water use not delegated to the national government. Originally, this meant that the states had complete authority to promote and protect the public's fishing rights and the residue of the authority to promote and protect navigation rights which were not within the national power.[56] While the national exercise of the commerce power has chipped away at the states' authority with respect to navigation, many of the states have compensated by chipping away at private rights to create new public rights under the public trust doctrine. These developments are discussed in Part III, section A, below.

### *C. Rights in the Use of Submerged Lands*

There are no practical or theoretical reasons why submerged lands cannot be privately owned. However, special rules governing the use of submerged lands have evolved, primarily because the use of submerged lands usually affects the flow or surface of the watercourse. A bridge or dam constructed on privately owned submerged lands may be an obstruction to navigation or have a negative impact upon a fishery. The development of minerals in submerged lands may pose similar problems. One way to avoid such conflicts is for the public to retain ownership of the submerged lands.

Under English law, the Crown held title to all lands underlying navigable waterways.[57] As successors to the sovereignty of the English Crown, the American states asserted title to these submerged lands.[58] With the formation of the Union, title to these lands remained with the states subject to the navigation servitude which the United States government had pursuant to the commerce clause.[59] Submerged lands which were not a part of any state were held in trust by the national government to be passed to new

55. Some states have asserted authority to regulate federal water projects. In California v. United States, 438 U.S. 645 (1978), the Supreme Court held that the State of California could require the Bureau of Reclamation to apply for a permit to appropriate water for the New Melones Dam and that the state could impose conditions on that permit. However, the Court made it clear that the state's regulatory powers were entirely dependent upon the historic deference of Congress to state regulation of water.

56. *See supra* note 47.

57. Attorney General v. Burridge [K.B., 1821], 5 Bain. & Ald. 268, 106 Eng. Rep. 190.

58. Shively v. Bowlby, 152 U.S. 1 (1894); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

59. *See supra* note 52 and accompanying text.

states upon admission to the Union.[60] With this as the basic principle of submerged lands ownership, the critical question was how to define navigable waters.

The definition of navigable waters was important to the determination of title to submerged lands as well as to the extent of the national commerce regulating power. With respect to the latter issue, navigability defined the relative powers of the state and national governments.[61] With respect to the former issue, navigability determined whether the state or private parties had title to submerged lands.[62] Although the basic issue in both cases is whether the waterway is navigable in fact, the extent of navigable waters for commerce clause purposes is much greater than the extent of navigable waters for title purposes.[63] Navigability for title to submerged lands is determined by the natural and ordinary condition of the waterway at the time of statehood.[64] Navigability for commerce clause purposes depends upon whether the waterway can be made navigable with reasonable improvements at the time the determination is made.[65] Thus, the latter definition allows for formerly non-navigable waters to become navigable, while title is dependent, as it should be, on an unchanging determination of navigability.

Once the submerged lands passed to the states, either directly from the English Crown or indirectly via the national government, it was entirely up to the states, subject to the limits of the public trust doctrine, whether they would retain those lands or convey them into private ownership.[66] Lands under non-navigable waters generally were owned by the riparian landowner in their entirety if the watercourse passed over the private land, or to the center of

---

60. Pollard's Lessee v. Hagen, 44 U.S. (3 How.) 212 (1845).

61. *See* United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

62. *See* Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922); United States v. Holt State Bank, 270 U.S. 49 (1926).

63. *See, e.g., Brewer-Elliott Oil & Gas Co.*, 260 U.S. 77 (1922); *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

64. *Brewer-Elliott Oil & Gas Co.*, 260 U.S. 77 (1922); *Holt State Bank*, 270 U.S. 49 (1926).

65. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

66. The question of alienation of public trust lands is a central issue in modern public trust debate, although the historic case law is very clear in recognizing the states' ability to alienate whenever consistent with the purpose of the trust. Although a legislative revocation of a grant of public trust lands was upheld in *Illinois Central*, the Court stated that such lands could be alienated where alienation will result in no "substantial impairment of the public interest in the lands and waters remaining." Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892).

the stream if it formed the boundary between properties.[67] The remaining question of title was with respect to the boundary between private riparian lands and submerged state lands under navigable waters.

### *D. Rights to the Use of Riparian Lands*

For most purposes, lands which border on water are no different than other lands in terms of the rights which attach to their ownership. However, riparian properties, because of their location, do have some special characteristics. Where riparian law governs the allocation of rights in the use of water, the riparian landowner has the significant benefits associated with such rights.[68] But even in appropriation jurisdictions, there are important issues which arise with respect to riparian lands. Two questions are of particular importance to the relationship between public and private rights: What factors determine the extent of riparian properties which have a watercourse or water body as their boundary? What limits, if any, are there on the rights of riparians to exclude others from their riparian lands?

As indicated previously, riparian properties bordering on nonnavigable waters will generally run to the center, or thread, of the stream or lake.[69] On navigable waters, where the bed of the waterway is normally owned by the state, the riparian property will extend to some natural feature along the shore, usually either to the high or low water mark. When states joined the Union, they acquired title to the submerged lands between the high water marks

---

67. *See* Bade, *Title, Points and Lines in Lakes and Streams*, 24 MINN. L. REV. 305 (1940).

68. Riparian jurisdictions have adhered to either of two theories to explain why water rights attach to the ownership of riparian lands. The "nature" theory holds that riparian lands are naturally associated with the adjacent water and the right to use the water should therefore attach to such lands. The "access" theory holds that riparian lands should have the right to use the water simply because they provide access to the water. Although these theories are generally merely of theoretical interest, they have influenced the determination of what constitutes riparian lands. The debate over the existence of riparian lands arises where lands are severed so as to leave nonriparian parcels or where riparian and nonriparian lands are united to form a larger parcel. The nature theory of riparianism is usually associated with the source of title test under which riparian lands are limited to the smallest parcel in the chain of title. The access theory is usually associated with the unity of title test under which riparian lands include all lands within a single parcel which borders on a watercourse. Not surprisingly, western states seeking to minimize the impact of riparian rights within predominantly appropriation systems have generally preferred the nature theory with its associated smallest tract rule.

69. *See* Bade, *supra* note 67.

on navigable waters pursuant to the equal footing doctrine.[70] Subject to the limits of the public trust doctrine, the states were then free to dispose of the submerged lands or to recognize a different border between the publicly owned submerged lands and private riparian lands. Some states chose to retain title to the high water mark, while others opted for the low water mark as the boundary of riparian lands,[71] thus effectively alienating the strip of land between the high and low water marks.[72]

Whether the private riparian's title extends to the high or low water mark, the rights associated with that title, including the right to exclude others, have always been subject to the same public rights that limit the rights of water users.[73] The navigation and fishing easement which the public possesses partly defines the definition of the extent of the riparian rights. Although the riparian may have the right to bridge over or wharf into a stream,[74] such actions cannot hinder navigation. In states recognizing riparian ownership to the low water mark, there may be public rights in the use of the land between the high and low water marks for fishing and navigation.[75] The riparian will have the right to construct diversion works, assuming the riparian also has a water right, but only to the extent that such works do not interfere with the public rights of navigation and fishing.

---

70. *See* Oregon v. Corvallis Sand and Gravel, 429 U.S. 363, 371-72 (1977); Miami Corp. v. State, 186 La. 784, 173 So. 315 (1936), *cert. denied*, 302 U.S. 700 (1937).

71. In 1895, the Montana Supreme Court surveyed state laws on title to the beds of navigable streams and concluded that the issue "has been so extensively treated that at this late day, when a new state is called upon to fix the rule, there is nothing left to say upon the subject, either new or original . . . ." Gibson v. Kelly, 15 Mont. 417, 420, 39 P. 517, 518 (1895). The court viewed its task as merely selecting among the "rules which have heretofore been adopted in different jurisdictions . . . ." *Id.* at 420, 39 P. at 518. The Montana court opted for the low water mark as the "wisest and most expedient rule." *Id.* at 422, 39 P. at 519.

72. States adopting the low water mark as the boundary of riparian land did not proceed on the basis that the state held title to the high water mark. Rather, the issue was approached as one of first impression and the finding that the low water mark defined the boundary was treated as a determination of the preexisting status of the rights in question. Thus there was an alienation of the land between the low and high water marks only in the sense that the common law boundary was the high water mark and the state was adopting a different rule.

73. *See supra* note 43.

74. *See* 3 AMERICAN LAW OF PROPERTY 874, § 15.35 (Casner ed. 1952).

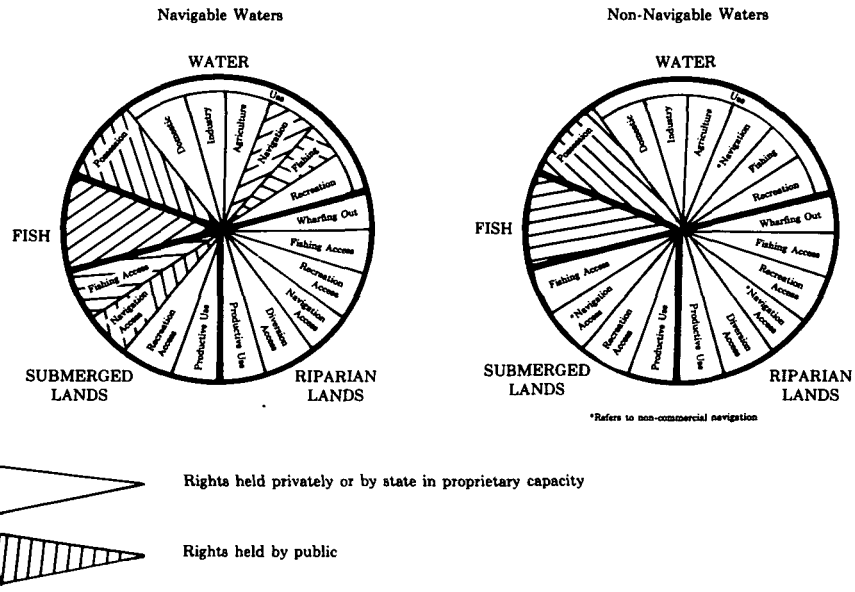
75. *See, e.g., Gibson*, 15 Mont. at 421, 39 P. at 519.

### *E. The Bundle of Rights in the Use of Water and Related Resources*

By combining the various rights discussed in the preceding four sections, we can draw a picture of the total bundle of rights which existed in water and water-related resources prior to the modern developments in the law of public trust and reserved rights. The historic bundle of rights, illustrated in Figure 1, combined rights in the water with rights in the associated land, and differed on navigable and non-navigable waters.

FIGURE 1

Traditional Allocation of Rights in Water and Water Related Resources




On navigable waters, rights in the use of water were generally held privately, either as riparian or appropriative rights, with the exception of the publicly held uses of navigation and fishing.[76] The possessory interest in the water was held by the public.[77] Rights in riparian lands were held privately, or by the state in its proprietary capacity, subject to the public easement for navigation and fish-

76. *See supra* notes 25-32 and accompanying text.
77. *See supra* note 20 and accompanying text.

ing.[78] These rights extended to the high water mark under the English common law and to either the high or low water mark under state laws.[79] Rights in submerged lands were held by the state or by private parties if legitimately alienated by the state, in either case subject to a public easement for navigation and fishing.

On non-navigable waters, all rights in the use of water were privately held.[80] The possessory interest in these waters was held by the public, thus preventing the riparian or private user from unreasonably reducing the water to possession.[81] The private users' rights were also limited by other private rights in the use of the water.[82] Rights in riparian lands were held privately or by the state in its proprietary capacity.[83] These rights extended to the thread of the stream where the stream constituted the boundary of the property, or included the entire bed of the stream where the waterway was within the property boundaries.[84] Thus, the private riparian on non-navigable waters held the right to control all uses of the water which required access from his riparian lands. He did not own the fish, which like the water were publicly owned, but he did have the right of access to the fish which could become his property if reduced to possession.[85]

In distinguishing among the various public and private rights in water and related resources, it is important not to confuse limits on private rights which result from other private rights and limits on private rights which result from public rights. The rules of riparian water law which limit water use to lands within the watershed and to reasonable uses reflect the correlative nature of private rights in a riparian system. The rules of appropriation water law which limit changes in use or point of diversion reflect the rights of other appropriators who might be affected by such changes. The state has the responsibility to enforce these limits on private rights, but not for the same reason the state has the responsibility to enforce the limits which result from the public rights of navigation and fishing. In the former case, the state acts on the motion of

78. *See supra* note 43 and accompanying text.
79. *See supra* notes 70-71 and accompanying text.
80. *See supra* notes 25-28 and accompanying text.
81. *See supra* notes 33-36 and accompanying text.
82. *See supra* note 29 and accompanying text.
83. Often states owned lands pursuant to federal grant. *See supra* note 66. Like private landowners, the state held water rights where the state lands were riparian. *See supra* note 67.
84. *See supra* note 67 and accompanying text.
85. Young v. Hickens, 6 Q.B. 606 (1844).

a private party to protect that party's right. In the latter case, the state acts as trustee to protect the rights of the public. If this distinction is not clear, the state is likely to equate its enforcement role with its role as trustee for the public, with the result that public rights will be perceived to be greatly expanded at the expense of private rights.

## III. Doctrines of Public Rights in Water

As indicated in the Introduction, there are several doctrines which have been employed by the courts as the basis for asserting public rights in water.[86] The public trust, reserved rights, and custom doctrines are discussed in this part, but there are other doctrines which might be used to achieve similar results. The navigation servitude has been mentioned previously.[87] The reasonable use doctrine, which has found its way from riparian to appropriation law, can easily be used to justify limits on private rights in the name of public rights. The beneficial use doctrine of appropriation law might be applied to similar purposes. At some point, these concepts will simply merge with the police power as all deriving from some vague notion of public rights which could serve to justify virtually any form of regulation. The result will be a property system in which rights are only as certain as the future actions of legislators and administrators. The following sections will illustrate this prospect in the relatively confined contexts of public trust, reserved rights, and custom.

### *A. Public Trust Doctrine*

After lying relatively dormant for much of the current century, the public trust doctrine has been revived and modified by courts in several states over the last two decades.[88] Although one can never know with certainty regarding causes and effects in the de-

86. *See supra* notes 11-12 and accompanying text.

87. *Supra* note 26.

88. Numerous authors have examined the modern developments in public trust law. *See The Public Trust Doctrine in Natural Resources Law and Management: A Symposium*, 14 U.C. Davis L. Rev. 181-429 (1980); Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 Rocky Mtn. Min. L. Inst. 17-1 (1985); Graff, *Environmental Quality, Water Marketing, and the Public Trust: Can They Coexist?*, 5 UCLA J. Envtl. L. & Policy 137 (1986); Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631 (1986); Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 Santa Clara L. Rev. 63 (1982).

velopment of the law, it is surely more than coincidence that this revival of the public trust doctrine followed Professor Joe Sax's seminal article in the 1970 *Michigan Law Review*.[89] Sax noted that an array of lawsuits relying on diverse legal theories had been filed in the late 1960s, all with the purpose of protecting the public interest in environmental quality.[90] Of these theories, concluded Sax, "only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems."[91]

The courts in numerous states have demonstrated that the public trust doctrine has significant potential as a tool of citizen intervention, via the courts, in the public management of natural resources.[92] Because the doctrine has been limited in its modern applications to its historical context of navigable waters,[93] it has not proven to be as comprehensive as Sax predicted, thus inspiring Sax to urge a decade after his first article, that the public trust doctrine be "liberated" from its "historical shackles."[94] The doctrine may yet be applied beyond the water's edge to achieve the most ambitious of goals,[95] but to date it has been confined to the context of water and water-related resources.

However, within that context, the public trust doctrine has been every bit as effective a tool as Sax anticipated, with different and

---

89. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

90. *Id.* at 473.

91. *Id.* at 474.

92. For a description of the developments in several states, *see infra* notes 95-98 and accompanying text.

93. For an account of the historical roots of the public trust doctrine, see Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980).

94. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980).

95. The public trust doctrine has been envisioned by some as applicable to any type of resource perceived to be in need of conservation. For example, Rick Applegate, writing for the Exploratory Project for Economic Alternatives, suggested that "as trustee of the coal it owns, a coal company could be prevented . . . from extracting excessive amounts of coal . . . ." *Public Trusts: A New Approach to Environmental Protection* (1976). In the abstract, this is a logical argument since the public may have as much or more interest in a depletable resource like coal as they have in a renewable resource like water. The public may be as dependent upon coal for heat and energy as they are upon navigable streams for commerce and fishing. Thus, it is not the logic of the argument for an expansive application of the public trust doctrine, but the nature of the common law which has confined the doctrine to its historical context of navigable waters. As will be seen, however, these historical shackles have been rather flexible.

more far reaching effects than any 19th century American court would have expected. For example, the public trust doctrine has been employed by the New Jersey Supreme Court to guarantee a public right of access across, and recreational use of, privately owned dry sand areas bordering the state's beaches;[96] by the Wisconsin Supreme Court to authorize the state's Department of Natural Resources to issue permits, over the City of Madison's objection, for the use of herbicides in the city's lakes;[97] by the California Supreme Court to authorize the California Water Resources Board to impose new conditions on or even curtail a water right granted to the City of Los Angeles in 1940;[98] and by the Montana Supreme Court to grant a public right of access to privately owned streambeds and riparian lands.[99] None of these results could have been imagined in the late 19th and early 20th centuries when the public trust doctrine was first applied to any significant extent in American law.[100]

Two questions arise from these developments. First, why has the doctrine experienced this latter day revival after several decades of dormancy? Second, why has the traditional doctrine been significantly distorted by many modern state courts? The answer to the first question was partially anticipated by Professor Sax when he explained the necessary attributes of a legal doctrine to serve the needs of environmentalists. "It must," wrote Sax, "contain some concept of a legal right in the general public; it must be enforceable against the government; and it must be capable of an interpretation consistent with contemporary concerns for environmental

96. Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355 (1984), *cert. denied*, 469 U.S. 821 (1984).

97. Wisconsin's Envtl. Decade, Inc. v. Department of Natural Resources, 85 Wis. 2d 518, 271 N.W.2d 69 (1978).

98. National Audubon Soc'y v. Superior Court of Alpine County, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), *cert. denied*, 464 U.S. 977 (1983) [hereinafter the Mono Lake case].

99. Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (1984); Montana Coalition for Stream Access v. Hildreth, 684 P.2d 1088 (1984).

100. The doctrine's first application in American law appears to have been by the New Jersey Supreme Court in Arnold v. Mundy, 6 N.J.L. 1 (1821). In that case, the court rejected a claim of exclusive private right to exploit oyster beds at the mouth of the Raritan River on the ground that there was a common right in "the air, the running water, the sea, the fish, and the wild beasts . . ." *id.* at 71, which the people of New Jersey "may make such disposition of . . . and such regulation concerning . . . as they may think fit," *id.* at 78, but which disposition had not been made in this case. The leading case on the doctrine is Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892), a case which adopts essentially the same interpretation as the *Mundy* case.

quality."[101] The public trust doctrine does seem to meet all of those criteria, but it also meets a fourth criterion in its modern formulation. It circumvents the nemesis of all public oriented resource management approaches—the takings clause of the fifth amendment to the United States Constitution. This attribute of the modern public trust doctrine also helps to answer the second question posed above. The traditional doctrine has been distorted to increase the benefits of its constitutional circumvention.

The public trust doctrine, like most American law of the 19th century, was inherited from the English common law. Its earliest application by an American jurisdiction appears to have been in the New Jersey case of *Arnold v. Mundy*.[102] Proponents of the modern public trust doctrine often quote the case for the proposition that there is a common property right to "the air, the running water, the sea, the fish, and the wild beasts . . . ."[103] Although that language can imply extensive public rights, it is clear that the New Jersey Supreme Court did not intend the expansive meaning that many subsequent courts have given it. In the same sentence, the New Jersey court explained that these resources are held as common property not because of moral necessity, but for the practical reason that they are "things in which a sort of transient usufructuary possession, only, can be had . . . ."[104] The public has the possessory interest, but private rights can and do exist in the far more significant usufructuary interest.[105]

Modern reliance on the *Arnold* case has also ignored the court's statements on the critical question of whether or not the state may alienate its possessory interest in these common properties. Acting through their legislature, said the *Arnold* court, the people of New Jersey

> may lawfully erect ports, harbours, basins, docks, and wharves . . . may bank off those waters and reclaim the land upon the shores . . . may build dams, locks, and bridges . . . may clear and improve fishing places . . . and may create, enlarge, and improve oyster beds . . . at the public expense or they may authorize others to do it by their own labour, and at their own expense, giving them reasonable tolls, rents, profits, or exclusive and tem-

101. Sax, *supra* note 89, at 474.
102. 6 N.J.L. 1 (1821).
103. *Id.* at 71.
104. *Id.*
105. *See supra* notes 33-36 and accompanying text.

porary enjoyments . . . .[106]

The private claim to oyster beds which was at issue in *Arnold* failed not because such private rights were impossible, but because the claim was based on ownership of riparian lands rather than on a proper legislative regulation or limitation of the public right.[107]

This basic understanding of the public trust doctrine was applied by other state courts during the 19th century[108] and by the United States Supreme Court in the landmark *Illinois Central* case.[109] *Illinois Central* is generally cited as the authority for modern applications of the public trust doctrine.[110] Like most Supreme Court opinions, the case contains language to support a wide variety of positions, but taken as a whole in the context of the facts of the case, the *Illinois Central* version of public trust doctrine is the same as the *Arnold* version. The Illinois Legislature granted the entire waterfront of the City of Chicago to the Illinois Central Railroad in 1869.[111] In 1873, the legislature repealed the grant[112] and the railroad filed suit claiming a fee simple interest.

Although the Supreme Court stated that the 1869 grant violated a "trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties,"[113] the violation was in the nature, rather than the fact, of the grant. The court concluded that the grant did not adequately protect the public rights in navigation and fishing.[114] It is not clear whether the problem was with the physical extent of the grant, the lack of express terms acknowledging the public rights, the fact that the grant purported to be in perpetuity, or some combination of the three.

The physical extent of the grant concerned the court because "it put it in the power of the company to delay indefinitely the improvement of the harbour . . . ."[115] The lack of express limits on

106. *Arnold*, 6 N.J.L. at 78.

107. The court said that the people of New Jersey "may make such disposition of them, and such regulation concerning them, as they may think fit . . . ." *Id.* at 78.

108. *See* Stevens, *supra* note 92.

109. 146 U.S. 387 (1892).

110. *See, e.g.*, Coastal Petroleum v. American Cyanamid, 492 So. 2d 339, 342 (Fla. 1986).

111. Act of April 16, 1869, Laws 1869.

112. Act of April 15, 1873, Laws 1873.

113. *Illinois Central*, 146 U.S. at 452.

114. *Id.* at 453.

115. *Id.* at 451.

the rights of the railroad concerned the court because "[a] corporation created for one purpose [is] converted into a corporation to manage and practically control the harbor of Chicago . . . ."[116] On both of these points, it is important to note that the Court's concerns were not with the prospect of development, but rather with the granting of an effective private monopoly over that development. The Court sought to protect the public's right to have the harbor developed to best promote commerce and navigation. Although the Court suggested that the 1869 Act may be void on its face because it purported to grant rights held in trust for the public,[117] its express holding was that the grant "was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the State over the lands . . . ."[118]

That holding did not mean that the legislature could not grant title to submerged lands, but only that such title could not be granted in such a manner as to waive the state's power, via subsequent legislatures, to promote the public trust by means other than private control. "Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it."[119] The legislature was always free to conclude that its trust responsibilities would best be achieved by placing the submerged lands in private control. In other words, the state could alienate submerged lands if it would not "substantially impair the public interest in the lands and waters remaining. . . ."[120]

The *Illinois Central* case was thus perfectly consistent with the earlier state cases on the critical parameters of the public trust doctrine. It recognized public rights of navigation and fishing in navigable waters,[121] it applied the federal test for navigability,[122] and it recognized that the state could alienate its title to sub-

116. *Id.*

117. "In every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make exclusive appropriation of the use of navigable waters, the grant was void." *Id.* at 458. This language might be read to void only that portion of a grant which interfered with the public right.

118. *Id.* at 460.

119. *Id.*

120. *Id.* at 453.

121. *Id.* at 452.

122. *Id.* at 446. At the time, the federal test was the "navigable in fact" standard of The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870). Later the Supreme Court extended the definition to include waters that could be made navigable with reasonable improvements. United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

merged lands so long as the alienation promoted or did not interfere with these public rights.[123] The public rights were limited to fishing and navigation.[124] The waters in which these public rights existed were limited to those under which the states held title by virtue of their statehood.[125] The states were free to exercise their proprietary right of alienation so long as it did not violate its sovereign duty as trustee for the public.[126]

After the *Illinois Central* decision, many state courts issued opinions applying the same limited interpretation of the public trust doctrine.[127] In the same year, the Florida Supreme Court held that "the navigable waters of the state and the soil beneath them . . . were held, not for the purposes of sale or conversion into other values, or reduction into several or individual ownership, but for the use and enjoyment of the same by all the people of the state for at least the purposes of navigation and fishing . . . ."[128] These sovereignty lands, as they are called in Florida, could not be relinquished "except . . . such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."[129]

In 1895, the Montana Supreme Court concluded that private riparian landowners held the right of possession in lands between the high and low water mark on navigable streams subject to public "rights of navigation and fishery upon the river."[130] In 1896, the Wisconsin Supreme Court held that

> [t]he right which the state holds in [the bed of a navigable lake] is in virtue of its sovereignty, and in trust for the public purposes of navigation and fishing. The state has no proprietary interest in them, and cannot abdicate its trust in relation to them, and while it may make a grant of them for public purposes, it may not make

123. *Illinois Central*, 146 U.S. at 455-56.

124. *See id.* at 452.

125. *Id.*

126. *See id.* at 453.

127. *See, e.g.*, State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893); Gibson v. Kelly, 15 Mont. 417, 39 P. 517 (1895); Priewe v. Wisconsin State Land and Improvement Co., 93 Wis. 534, 67 N.W. 918 (1896).

128. State v. Black River Phosphate Co., 32 Fla. 82, 106, 13 So. 640, 648 (1893). The court did open the door in this case to a possible expansion in public trust uses by saying that there may be implied uses in addition to navigation and fishing. *Id.* at 106, 13 So. at 648.

129. *Id.* at 98, 13 So. at 645.

130. Gibson v. Kelly, 15 Mont. 417, 423, 39 P. 517, 519 (1895).

> an irrepealable one; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.[131]

In 1901, the California Supreme Court held that the right of a private owner to reclaim swampland was subject to the paramount "right of the public in the use of a stream as a public highway . . . ."[132] This holding was based upon an 1884 decision in which the court stated that

> [t]he State holds the absolute right to all navigable waters and the soils under them . . . . The soil she holds as trustee of a public trust for the benefit of the people; and she may, by her legislature, grant it to an individual; but she cannot grant the rights of the people to the use of the navigable waters flowing over it.[133]

The public trust law in these states and most others was remarkably consistent with the law as stated by the Supreme Court in *Illinois Central*. It is remarkable because the doctrine is not one of federal law which would oblige the states to follow the Supreme Court's precedent. Thus the fact of uniformity is evidence of how ingrained the doctrine was at the turn of the century. In any state, the public trust case law would have fit comfortably into the bundle of property rights illustrated in Figure 1 above.[134] The dramatic and drastic change in the doctrine described at the beginning of this section does not fit so easily into this picture of property rights in the use of water and related resources.

### *B. Federal Reserved Rights*

The great water lawyer Frank Trelease once illustrated the impact of federal reserved rights on the private rights systems of the western states in a fable.[135] Trelease told of a divine God-King who established a satrap over conquered land. The God-King left the satrap in charge except that the God-King chose to dispose of all of the land. The water, it was decided, belonged to no one. Subsequently, the satrap undertook to dispose of rights to use the water

---

131. Priewe v. Wisconsin State Land and Improvement Co., 93 Wis. 534, 550-51, 67 N.W. 918, 922 (1896).

132. People v. Russ, 132 Cal. 102, 105, 64 P. 111, 112 (1901).

133. People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 151, 4 P. 1152, 1159 (1884).

134. *Supra* at p.187, Figure 1.

135. Trelease, *A Fable*, in F. TRELEASE, WATER LAW: RESOURCE USE AND ENVIRONMENTAL PROTECTION 815 (2d ed. 1974).

and the God-King affirmed these actions in either the year 877 or 866.[136] Later the God-King decided to create a Royal Preserve. Nothing was said about water for this preserve. Many years later, the God-King claimed the right to use water which the satrap had previously granted to private users. The private water users urged that this action by the God-King violated the Fifth Amended Decree in which the God-King had promised to pay for any property taken, but the God-King insisted that the water had been preserved with the land.

Through this fable, Trelease underscored one of the effects of the doctrine of federal reserved rights. Earlier, using a more conventional approach, Trelease had argued that with or without the reserved rights doctrine the federal government had the power to acquire water for its reservations of land. "The only difference resulting from reliance on the reservation doctrine instead of on a more basic federal power," wrote Trelease, "is that in some cases where the water is taken from persons who have previously put it to use the United States need not pay for the taking."[137] To understand why the doctrine was perceived by Trelease and many others to have the effect of taking vested water rights without compensation, a brief account of the doctrine and its place in the evolution of western water law is necessary.

In an effort to encourage settlement of the vast western lands which the United States acquired in the early 19th century,[138] Congress adopted various approaches to disposing of those lands. Some were transferred to the new states upon their entry into the Union, but most were available for private acquisition[139] or were granted to encourage the development of the railroads.[140] In its early land

136. The years 1866 and 1877 represent the dates of the earliest congressional legislation on the granting of private water rights in the western states. The federal government owned most of the land in the west and gradually disposed of it through an assortment of programs. As land was developed for mining and farming, water was required. In the absence of any federal law or regulation, the states administered the water rights systems described in Part II, section A, *supra*. In 1866 Congress formally recognized the existing uses of water on the public domain (Act of July 26, 1866, ch. 262, § 9, 14 Stat. 253, 43 U.S.C. § 661), and in 1877 Congress reaffirmed this acceptance of the state appropriation laws (Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377, 43 U.S.C. § 321).

137. Trelease, FEDERAL-STATE RELATIONS IN WATER LAW, NATIONAL WATER COMMISSION LEGAL STUDY No. 5, 147m (1971).

138. *See* R. ROBBINS, OUR LANDED HERITAGE (2d ed. 1976).

139. *See, e.g.*, The Preemption Act of Sept. 4, 1841, ch. 16, 5 Stat. 453 (1841); Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392 (1862); The Desert Land Act of March 3, 1877, ch. 107, 19 Stat. 377 (1877).

140. *See* B. ELLIOTT & W. ELLIOTT, 2 LAW OF RAILROADS 212 (1907).

disposal legislation, Congress failed to provide guidance with respect to water allocation and ownership. The western development encouraged by federal land policies did not await a federal policy on water. Development proceeded apace and the necessary water rules were adopted, first by local communities and then by the state and territorial governments.[141]

Not until 1866 did Congress address the question of allocating the waters of the public domain lands. In deference to the significant western economy which was relying on customary and state water laws, Congress formally recognized the legitimacy of the existing uses "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, and other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts."[142] In 1870, Congress made newly patented and homesteaded lands "subject to any vested and accrued water rights."[143] The Desert Land Act of 1877, although applying only to thirteen western states, recognized the validity of vested water rights and specifically acknowledged the doctrine of prior appropriation.[144] Congress said no more on the subject, so it was left to the courts to determine the extent of rights retained by the federal government.

The primary focus of Congress was the disposition of its western land holdings; it showed little concern for the question of federal water rights. In the latter half of the 19th century, however, Congress undertook a policy of reserving selected lands.[145] Whether reserving lands for forests, national parks or military bases, Congress made no mention of the water on those lands or the water which might be necessary to make the reservations serve their purposes.

In 1899, the Supreme Court recognized the authority of the states to abandon the common law riparian system in favor of the appropriation doctrine.[146] However, the Court articulated two limitations, one of which was relevant to defining water rights on federal reserved lands:

> [I]n the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the

141. For a history on western water law, see 1 W. HUTCHINS, *supra* note 27, at 180-200.

142. Act of July 26, 1866, *supra* note 136.

143. Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218, 43 U.S.C. § 661.

144. Act of March 3, 1877, *supra* note 136.

145. For an account of this history, *see* Huffman, *A History of Forest Policy in the United States*, 8 ENVTL. L. 239, 253-68 (1978).

146. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899).

> owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property.[147]

The potential impact of this statement in terms of the nature and extent of federal water rights on reserved lands would not become apparent until the 1963 decision in *Arizona v. California*.[148] Nearly a century would pass between Congress' first recognition of the validity of state granted private rights in water and the Supreme Court's recognition of significant federal rights in those same waters, during which time hundreds of thousands of private water users would come to rely on their state created rights.

The seed for the idea that the federal government possessed water rights superior to those held by private water users was not firmly planted until *United States v. Winters* in 1908.[149] The Court's 1899 decision in *United States v. Rio Grande Dam and Irrigation Co.*[150] spoke only to the riparian owner's right to the natural flow of a stream, not to a water right to serve whatever purpose may have motivated the reservation of riparian lands. In *Winters* the Court held that, when Congress reserved lands for Indians, there was an implied reservation of sufficient water to fulfill the purposes of the reservation.[151] The effect of the holding was to recognize Indian water rights superior to those asserted by private claimants who appropriated subsequent to the date of the reservation. Private claimants who had appropriated water prior to 1908 were clearly affected and no doubt were distressed by this development.

The legal foundation of the federal reserved rights doctrine articulated in *Arizona v. California* is certainly no stronger than the *Winters* doctrine, and justice, if it has anything to do with the fifth amendment, is on the side of the affected private claimants. Private rights vested for nearly a century were held to be subject to federal rights recognized only in 1963.[152] No one could reasonably argue that a private appropriator at the turn of the century knew that his rights were subject to rights held by the federal govern-

---

147. *Id.* The court also stated that the state authority to create private appropriative rights was limited by the navigation servitude, discussed *supra* in text accompanying note 52.

148. 373 U.S. 546 (1963).

149. 207 U.S. 564 (1908).

150. 174 U.S. 690 (1899).

151. 207 U.S. at 578.

152. Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955).

ment simply because the government had reserved forest lands from the public domain. From the perspective of the private water right holder, it makes no difference whether the government takes his water without compensation or, in the alternative, claims that Congress impliedly reserved the water for its future use. The implication could have been apparent to no one, and the damage to the water rights system is not altered by the myth of a prior federal right.

From the perspective of the government, however, it is a matter of considerable difference that the government be able to claim a water right implied in the reservation of lands. If the government can assert such a right, it will not have to pay for taking that to which others claim to have a right. The courts can recognize the validity of private claims while insisting that those claims were always subject to prior public rights. The government's other option is to exercise its eminent domain powers to acquire the waters necessary for the federal reserved lands. Apparently the costs of this alternative are thought to exceed the costs to disappointed private claimants who could not have known that their rights were subject to allegedly prior public rights.

Having begun this section with Frank Trelease's fable, I should conclude by noting that his concerns about the consequences of the federal reserved rights doctrine waned over the succeeding years. In 1964, Deputy Attorney General Nicholas Katzenbach told a Senate committee that "for all of the outcry . . . not one state, not one county, not one municipality, not one irrigation district, not one corporation, not one individual has come forward to plead and prove that the United States . . . has destroyed any private right."[153] In 1977 Trelease indicated that "[t]wenty two years after *Pelton Dam* this is still true."[154] But Trelease also said that "[a]t no time prior to 1955 [*Pelton Dam*] did I ever hear a suggestion that the reserved rights doctrine was anything but a special quirk of Indian water law."[155] Thus Trelease's conclusion, at its most favorable, was that the federal reserved rights doctrine had created new public rights but that it had not had a significant impact on private rights. Of course, that does not mean that there will be no

153. *Hearings on S. 1275 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs*, 88th Cong., 2d Sess. 39 (1964) (statement of Nicholas Katzenbach, Deputy Att'y Gen.).

154. Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 DENVER L.J. 473, 492 (1977). (*Federal Power Comm'n v. Oregon* is also known as *Pelton Dam*).

155. *Id.* at 475.

future impacts on private rights, and in any event, the lack of significant private detriment should not excuse the evasion of constitutional limits. As Justice Holmes said in *Pennsylvania Coal*, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[156]

### C. Custom

The English common law doctrine of custom has been used sparingly by American courts.[157] Although the Oregon Supreme Court relied on the doctrine in 1969 as the basis of public rights in the state's dry sand beaches,[158] custom has not been employed by other states to justify public rights in natural resources.[159] The doctrine of custom has been more limited in application than the public trust doctrine because its common law formulation limits its usefulness as a means of evading constitutional protections of private property.[160] Unlike the public trust and reserved rights doctrines, the doctrine of custom allows the creation of public rights where private rights are recognized to have previously existed. If uncompensated, this alteration of admittedly vested private rights necessitates some justification, a problem avoided by the public trust and reserved rights doctrines. In other words, the doctrine of custom admits the prior existence of private rights and asserts the intervention of public rights. This approach to the recognition of public rights is more difficult to justify than one which asserts that

---

156. Pennsylvania Coal Co. v. Mahon, 260 U.S. 392, 416 (1922).

157. The only modern application of the doctrine was by the Oregon Supreme Court in State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969), in which the Oregon Court held that there was a public right of access to and use of all of the dry sand beaches of the state. In the 19th century the New Hampshire courts adopted the doctrine as it had been applied under English law. *See* Nudd v. Hobbs, 17 N.H. 524 (1845); Knowles v. Dow, 22 N.H. 387 (1851).

158. In Thornton v. Hay, the court relied upon Blackstone's explanation of the common law doctrine. *Thornton*, 254 Or. at 595, 462 P.2d at 677. *See* 1 W. BLACKSTONE, COMMENTARIES *73-78.

159. *But see* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974) (where the Florida Supreme Court recognized in dicta that when the public's use of the beach was ancient, reasonable, without recognition, and free from dispute, custom has been established and the public gains a right to use the beach).

160. "The Oregon Supreme Court's unexpected revival of the English doctrine of custom presents significant logical and constitutional problems. As a consequence, the doctrine's future utility is impaired as a viable source of securing public rights in private property." Note, *The English Doctrine of Custom in Oregon Property Law: State ex rel. Thornton v. Hay*, 4 ENVTL. L. 383, 384 (1974).

the public rights were senior to private rights all along.

Under the English doctrine of custom, the public can acquire rights through the long, immemorial use of private property.[161] According to Blackstone, customs can exist with respect to many subjects in addition to rights in property.[162] The type of custom asserted in the Oregon beach case is included by Blackstone in the category of "particular customs, or laws which affect only the inhabitants of particular districts."[163] The existence of a custom is proven merely by evidence of actual public use,[164] but its legality requires proof that the custom is (1) immemorial,[165] (2) continuous,[166] (3) peaceable,[167] (4) reasonable,[168] (5) certain,[169] (6) compulsory,[170] and (7) consistent with other customs.[171]

Some public rights claimed under the doctrine of custom are indistinguishable from the public rights claimed under the public trust doctrine in the sense that they are prior in time to vested private rights in property. "[S]ome of them," wrote Blackstone, "are without doubt the remains of that multitude of local customs . . . out of which the common law, as it now stands, was collected . . . ."[172] However, he makes it clear that public rights can be acquired in vested private rights pursuant to the doctrine of custom, if a public use is so long that "the memory of man runneth not to the contrary."[173]

---

161. 1 BLACKSTONE, *supra* note 158, at *74-78.

162. Blackstone mentions customs with respect to the "holding of diverse inferior courts" and "with regard to trade, apprentices, widows [and] orphans," as well as many customs relative to succession to title in property. *Id.* at *74-75.

163. *Id.* at *74.

164. *Id.* at *75.

165. "[I]f any one can [show] the beginning of it, it is no good custom." *Id.* at *76.

166. Blackstone distinguishes between an interruption of the right, which destroys the custom, and an interruption of possession, which does not. *Id.* at *77.

167. "For as customs owe their [origin] to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting." *Id.*

168. "Which is not always . . . to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law." *Id.*

169. The example offered by Blackstone demonstrates the commitment by English courts to protect the benefits of certainty which derive from private property. *Id.* at *78.

170. Although it is not so stated by Blackstone, this requirement surely had application only to the imposition of burdens, rather than benefits, on the public. Blackstone cites as an example customary payments for the maintenance of a bridge which if to be paid only at the pleasure of every man would be "idle and absurd, and indeed, no custom at all." *Id.*

171. "[O]ne custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd." *Id.*

172. *Id.* at *74.

173. *Id.* at *76. The requirement that the custom be immemorial appears to have meant

Under English law, this was no doubt a demanding standard to satisfy, but in a young jurisdiction like Oregon the reach of legal memory is short.[174] The Oregon court concluded that " 'long and general' usage is sufficient," and found the requirement satisfied by the fact that "[s]o long as there has been an institutionalized system of land tenure in Oregon, the public has freely exercised the right to use the dry-sand area up and down the Oregon coast . . . ."[175]

The requirements of the doctrine of custom, as stated by Blackstone and applied by the Oregon Supreme Court, are consistent with a system of private rights in land. The doctrine is analogous to the common law doctrine of prescription under which rights in land can be acquired by an adverse user.[176] Because the public is an amorphous entity against which legal action objecting to adverse use is difficult, customary use over a long period of time and without objection by a private claimant is a reasonable method for establishing title to apparently abandoned private property. The private claimant has ample opportunity to object to the public use which will void any public claim of right, and successors in title should have no difficulty determining the customary limits on their private rights.

This does not mean that the doctrine of custom could not present some of the same problems posed by the public trust and reserved rights doctrines. For example, the elements of a customary right could be interpreted so as to alter the reasonable expectations of private land owners by concluding that immemorial means no claim contrary to the customary use within the memory of those people presently living in a particular locality. No court has yet been willing to propose such a drastic modification of the common law doctrine. The reason is that such a modification would be a blatant violation of basic constitutional protections of private property rights. Even the Oregon Supreme Court's modest adapta-

---

not that a living person must remember some contrary use, but that history not record any contrary use. The English courts fixed the date of earliest legal memory at the beginning of the reign of Richard I in 1189. Chapman v. Smith, 28 Eng. Rep. 324, 326-327 (Ch. 1769).

174. With respect to most common law doctrines, the legal memory in Oregon can be as long as the history of the common law, but particular customs "affect only the inhabitants of particular districts." 1 BLACKSTONE, *supra* note 158, at *73.

175. State *ex rel.* Thornton v. Hay, 254 Or. 584, 596, 462 P.2d 671, 677 (1969).

176. Coke, upon whom Blackstone relied for his interpretation of the law of custom, wrote that "prescription and custom are brothers and . . . ought to have the same Age, and Reason ought to be the Father and Congruence the Mother, and Use the Nurse, and Time out of Memory to fortify them both." Rowles v. Mason, 123 Eng. Rep. 892, 895 (C.P. 1612).

tion of the doctrine raised sufficient constitutional objections[177] such that the doctrine has not been relied on in other jurisdictions, nor has it resurfaced in Oregon.[178]

## IV. The Impact on Private Rights

Although the foregoing discussion makes it clear that recent developments in the law of public trust and federal reserved rights have had a significant impact on private property rights, the impact can be best understood by recalling the allocation of rights in water and related resources illustrated in Figure 1 at page 187. Figure 2, on the following page, shows the extent to which the modern public trust and reserved rights doctrines have altered vested private rights without compensation to the owner.

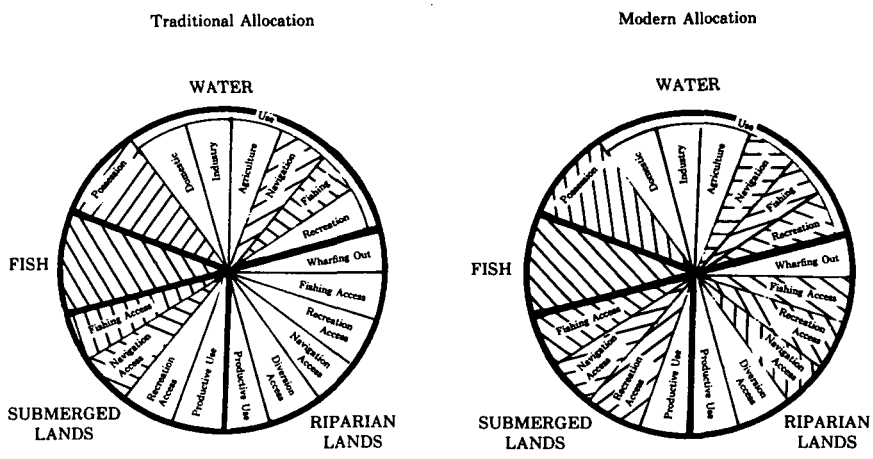
177. Note, *supra* note 160, is critical of the Oregon court's use of the doctrine of custom as posing both logical and constitutional problems. The author agrees with the concurring opinion of Justice Denecke in *Thornton* that the result is correct but the use of the doctrine of custom is mistaken. Denecke urged that the court rely on the public trust doctrine. State *ex rel.* Thornton v. Hay, 254 Or. 584, 600, 462 P.2d 671, 678 (1969) (Denecke, J., concurring).

178. Concern that the doctrine might be extended to uphold public rights in other private property led the Oregon Legislature to adopt legislation in 1973 designed to encourage private land owners to make their lands available for public recreation "by protecting their interests in their land from the extinguishment of any such interest or the acquisition by the public of any right to use or continue the use of such and for recreational purposes." Ch. 732, § 3, 1973 Or. Laws 1757.

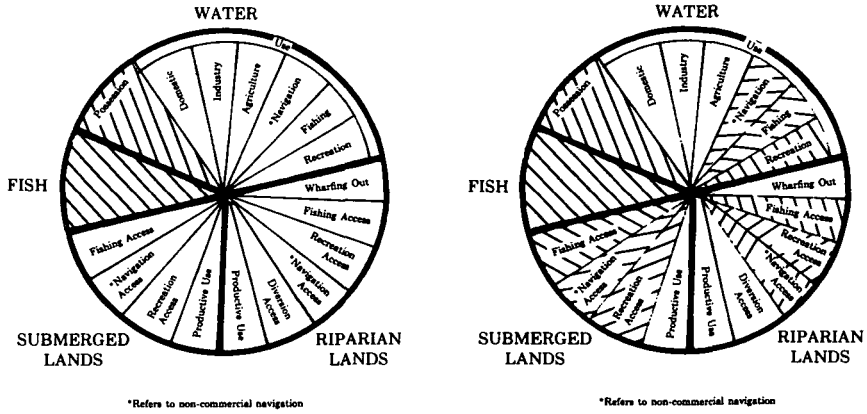
FIGURE 2

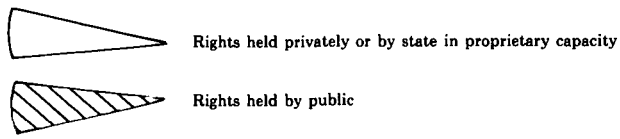
Impact of Modern Public Trust and Reserved Rights Doctrines on Allocation of Rights in Water and Water Related Resources

Navigable Waters




Non-Navigable Waters



On navigable waters, the impact of the modern public trust cases has been to expand the range of uses to which the public has a right to put the water and the submerged and riparian lands. Generally, the expansion has been in the direction of recreational uses. The significance of this expansion depends upon the nature of the land, and in particular its usefulness for recreation. If it has high recreational value, that value will have been reflected in the private owner's valuation and the loss of the private control of recreational use will be significant. The loss to the private owner will be less if the land has other valuable uses as well, although the new public recreational rights may restrict other uses if those other uses are not compatible with recreation.

The impact of these new public rights is not limited to the prospect of people floating down streams, tanning on beaches, and walking across riparian lands. The Mono Lake case suggests that an appropriative water right might have to give way to public uses, even though those public uses were not a sufficient basis to deny granting of the water right in the first place.[179] Thus, private rights in land and in the use of water are both subject to an expanding easement held by the public. It is an easement which the courts will define, and which the courts will expand and change as public needs expand and change. With this as a legal tool, it is difficult to imagine why the state would ever feel it necessary to resort to eminent domain for the acquisition of public uses of water and water-related resources.

On non-navigable waters, the impact of the modern public trust doctrine has been far more dramatic in some jurisdictions. For example, in Montana the supreme court has abandoned the historic definition of navigability in favor of a definition based on recreational use.[180] The result has been to extend the reach of the public trust doctrine from approximately 2,000 miles of streams to nearly 20,000 miles of streams.[181] The private water users and land owners on all of the previously non-navigable waters now find that there are public rights for fishing, navigation, and recreation which

---

179. National Audubon Soc'y v. Superior Court of Alpine County, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), *cert. denied*, 464 U.S. 977 (1983). *See* Dunning, *supra* note 88, at 17-39; Huffman, *Trusting the Public Interest to Judges*, 63 DEN. U.L. REV. 565, 580 (1986).

180. Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 171 (1984).

181. Anderson, *The Public Trust vs. Traditional Property Rights: What are the Alternatives*, in WESTERN RESOURCES IN TRANSITION: THE PUBLIC TRUST DOCTRINE AND PROPERTY RIGHTS 13 (Political Economy Research Center) (1986).

entitle people to use not only the state-owned water but also the privately owned submerged and riparian lands below the high water mark.

Some will object that the public always had the right to these recreational uses, but that objection misses the point of the argument. The argument assumes, not without persuasive evidence, that the public did not always have such recreational rights. Even if it is demonstrated that in some jurisdictions the public had some recreational rights, it cannot be disputed that those rights have been significantly expanded by some courts over the past two decades. The issue is whether it is in the public interest to create new public recreational rights, to whatever extent that has happened, without compensating for the affected private rights. The takings clause ought to be interpreted to answer that question in the negative. The public trust doctrine permits that question to be answered in the affirmative.[182]

The impact of the federal reserved rights doctrine is similar in principle, if not in magnitude.[183] Private rights in water use which have been granted by the state with the explicit approval of Congress are displaced in the critical priority of rights by indefinite federal rights. In an appropriation system, the fact that the private right still exists is of little significance if the priority of that right is such that water will not be available during periods of scarcity. Unlike the public trust doctrine, the reserved rights doctrine is not tied to any definition of navigability and therefore affects private rights in water use on both navigable and non-navigable streams.

The theory of the doctrine is one which could as easily be applied to the creation of public rights in privately owned submerged and riparian lands, and to resources with no connection at all to water. Unlike the public trust doctrine, which is firmly rooted in water law, the reserved rights doctrine rests on a general principle of implied intentions which could be applied to gain public access to any resource which will serve the purposes of a federal reservation. Although the case law is restrictive to date,[184] the courts might easily expand the reach of the doctrine by liberalizing definitions of reservation purposes, or by implying water rights for federal purposes not associated with reserved lands.[185]

---

182. For a general discussion of the public trust doctrine, *see supra* Part III, section A.

183. For a general discussion of the reserved rights doctrine, *see supra* Part III, section B.

184. *See, e.g.*, United States v. New Mexico, 438 U.S. 696 (1978).

185. The concept of implied federal nonreserved water rights was urged by Department

## V. WHY COURTS SHOULD NOT ALLOCATE NATURAL RESOURCES

Proponents of the modern public trust doctrine and defenders of the federal reserved rights doctrine have generally claimed that both doctrines are firmly rooted in historic principles of property law; that is, that the courts have not intervened in the public and private allocation of water resources. Professor Rodgers explains in his environmental law treatise that the public trust doctrine "is another version of the 'hard look' that has spread its influence so widely throughout natural resource and environmental law."[186] According to this view, it is a procedural doctrine adapted to the resolution of issues which blend "holy causes (saving birds, protecting marshlands) with crass pursuits (navigation and commerce)."[187] Professor Sax bases his public trust analysis on the claim that the doctrine "is not so much a substantive set of standards . . . as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process."[188] The public trust doctrine, says Sax, is a "medium for democratization."[189]

Even if the courts perceive that they are acting in defense of democracy, they will not be able to avoid the allocational choices implicit, if not explicit, in their decisions. Although some proponents of the modern developments in the doctrine admit that it requires the courts to make substantive resource allocations,[190] the

---

of the Interior Solicitor Martz, *Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation, and Bureau of Land Management*, 88 INTERIOR DEC. 553 (1979). The concept died an early death at the hands of a subsequent solicitor, *Legal Memorandum, Federal "Non-Reserved" Water Rights* (1982). For a brief account of these developments, *see* F. TRELEASE & G. GOULD, WATER LAW: CASES AND MATERIALS 806, 807 (4th ed. 1986).

186. W. RODGERS, I ENVIRONMENTAL LAW: AIR AND WATER 162 (1986).

187. *Id.* Rodgers does recognize that the doctrine had an inevitable substantive component which he predicts will ultimately result in the use of a balancing approach similar to that used in nuisance law. *Id.* at 165.

188. Sax, *supra* note 89, at 509. Sax argues that courts must sometimes overturn legislative and executive decisions because "it will often be the case that the whole of the public interest has not been adequately considered by the legislative or administrative officials . . . ." *Id.* at 495.

189. *Id.* at 509.

190. Professor Wilkinson asserts that the doctrine is rooted "in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made principles," although he also asserts that it is a "value neutral" approach. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 315-16 (1980). With reference to the Mono Lake case, Professor Dunning concludes that "[a]ll existing water rights which adversely impact public trust values are not subject to reconsideration and modification by either an agency or a court in the name of the public trust." Dunning also recognizes the close relationship between the public trust and reserved rights doctrine which is discussed in this article. Dunning, *The Public Trust Doctrine and*

central issue should not be whether these judicial doctrines promote democracy. The issue should be whether the individual rights guaranteed by the Constitution are infringed, whether at the hands of the democracy or the courts. It is no more comforting to the property owner, nor beneficial to the public welfare, to have vested rights violated in the name of democratic choice than to have those rights violated in the name of judicial choice.

Many who object to the modern public trust and reserved rights doctrines would label them the products of judicial activism. For many political conservatives there could be no more condemning appellation for a judge or a court than "activist", but we should be chary of simplistic criticism on the basis of that concept. Totally nonactivist courts may be those which always defer to the will of the majority as expressed through the legislature. These are not the kind of courts required in a constitutional system which guarantees the protection of basic individual liberties. Courts must be active in protecting against the tyranny of the majority, whether the majority seeks to take private property or limit free speech. Absent such violations of individual rights, courts should refrain from interfering in the democratic process not because democratic decision making is the ultimate objective of our constitutional government, but because the courts have no capacity to make the kinds of decisions which our Constitution allocates to the legislative branch of government.[191]

The central problem with the public trust and reserved rights doctrines is that, by necessity, they involve the courts in substantive decisions which require the determination of the public interest. It is this type of judicial activism which should concern advocates of individual freedom as well as advocates of democratic government. "In a democratic state, the legislature is by definition the final arbiter of the public interest. Indeed, the concept of the public interest is what justifies majoritarian, democratic government. It is therefore illogical to urge judicial activism as a means of protecting the public interest."[192] Rather than dredging from the depths of the common law waters old doctrines which function to limit private rights, the courts should be applying the Constitution

---

*Western Water Law: Discord or Harmony?*, 30 ROCKY MTN. MIN. L. INST. 17-1, 17-39, 17-42 to 17-44 (1985).

191. I have developed this thesis in somewhat greater detail in Huffman, *A Coherent Takings Theory at Last: Comments on Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 17 ENVTL. L. 153, 175-79 (1986).

192. *Id.* at 177.

to protect private rights.

The legislature needs no assistance from the courts as it seeks to accommodate the many pressures from interest groups who would have a larger piece of the resource pie. The task of the courts, which they should pursue as actively as possible, is to protect individuals from the efforts of the legislature to provide constituents with something for nothing. As the environmentalists are fond of saying, there is no such thing as a free lunch. The question is whether the lunch will be paid for by those who eat it or by those whose property is taken without compensation. It is in the public interest that it be the former.

## VI. CONCLUSION

The objective of this article has been to demonstrate the fundamental inconsistency of certain doctrines of water law with a private rights system of resources allocation. Some readers will disagree with the premise that the public interest will be served by reliance on a private property system for the allocation of scarce resources. I have not undertaken to make that case here, although I and many others have made it elsewhere.[193] What I have undertaken to do is demonstrate that, in the area of water law, our courts have acted to the detriment of the property rights system. To the extent that we believe that private decisions will optimize the social benefits we can derive from our scarce resources, we should be concerned about judicial doctrines which alter private rights with impunity.

Much of what I have discussed is no doubt water under the bridge in the sense that the combination of kinetic energy and inertia which define the law will not permit the drastic revisions which my critique would suggest. The federal reserved rights doctrine is well ingrained, and the narrow reading which most courts have given it may indicate an effort by the courts to limit the damage.[194] As the discussion of custom indicates, the doctrine never really got off the ground, perhaps for the same reason. But in light

193. *See, e.g.*, Huffman, *Instream Water Use: Public and Private Alternatives*, and other papers in T. ANDERSON, WATER RIGHTS: SCARCE RESOURCE ALLOCATION, BUREAUCRACY AND THE ENVIRONMENT (1983).

194. In United States v. New Mexico, 438 U.S. 696 (1978), the Supreme Court rejected expansive claims of water rights on the Gila National Forest by distinguishing primary and secondary purposes of the reservation. Reserved water rights were limited to those necessary for the achievement of the primary purposes of the reservation which were those purposes set forth in the reservation itself and the authorizing legislation. *Id.* at 698.

of the recent developments in public trust law, it is more likely that the courts have simply recognized the inherent limits of reserved rights and custom as tools for evasion of the takings clause.

The central concern should be with the public trust doctrine which threatens to grow out of control. It is not too late for the courts to take a hard look at this doctrine and to recognize it for what it has become in many jurisdictions. Rather than a protection of long-recognized public rights, which it was, it has become a means for the states to regulate and take private property without having to give even passing consideration to the fifth amendment. The takings clause is circumvented by relying on the fiction that newly created public rights existed prior to the vesting of any private rights. The law, as recorded in the case reporters, statute books, and title records, reveals that many of these assertions of long-standing public rights are pure mythology.

In some jurisdictions, the developments in public trust law have progressed sufficiently to expose the constitutional evasion implicit in the recent decisions. If a court can evade the restraints of the takings clause by articulating new public rights, why continue to struggle with the problem of determining whether any governmental action which affects private property is a taking? Rather than seeking explanations for why some exercises of the police power require compensation and others do not, the courts can avoid the problem by asserting that the state is simply acting pursuant to its responsibility to protect public rights. This is precisely the approach which was kiddingly proposed in the Introduction.

The best illustration of the reality of this prospect is to be found in Florida law. The Florida public trust doctrine has traveled an uncertain path as the supreme court and legislature have sought to give it definition. By 1962, the supreme court seemed to have come full circle from its 19th century position in the case of *Gies v. Fisher*, which confirmed the traditional view that submerged lands could be alienated if consistent with the purposes of the trust.[195] However, when *Gies* is read in conjunction with the 1965 decision in *Zabel v. Pinellas County Water and Navigation Control Authority*,[196] the concept of public trust may be merging with the police power under Florida law. In the words of Michael Rosen:

> The rationale of *Gies* and *Zabel* revealed a new perspective on

195. 146 So. 2d 361 (Fla. 1962).
196. 171 So. 2d 376 (Fla. 1965).

> private rights in sovereignty lands by suggesting that the grantee's title could be equated with the ownership of nonsovereignty land; that the retained governmental trust power could be equated with the police power; and that the state could be estopped from exercising its authority to prohibit the grantee's use of the property without payment of just compensation.[197]

The California Supreme Court decision in the Mono Lake case also comes very close to equating the state's responsibilities as trustee with its authority pursuant to the police power.[198]

If the state can take private rights without compensation by relying on the myth of the public trust doctrine, there will be little reason for the courts to insist on compensation when the state pursues the same ends through the police power. The next logical step will surely be to equate the state's police power with its responsibilities as a trustee and thus avoid the fifth amendment entirely. The public interest would suffer from such a development. The only beneficiary would be the takings doctrine, which would no longer be troubled by courts desperately trying to explain why the takings clause means something different from what it says. The takings clause could be quietly interred after a very long and painful death.

---

197. Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. FLA. L. REV. 561, 596 (1982).

198. National Audubon Soc'y v. Superior Court of Alpine County, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), *cert. denied*, 464 U.S. 977 (1983).